Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-675

JOHN E. RING,

Petitioner,

vs.

JOHN A. WADDINGTON, Director of Motor Vehicles, and STATE OF NEW JERSEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner, John E. Ring, prays that a Writ of Certiorari issue to review a final judgment of the U.S. Court of Appeals for the Third Circuit.

The opinion of the District Court, dated November 22, 1976 is unreported. The Court of Appeals affirmed without opinion and denied a Petition for Rehearing without opinion.

Jurisdiction

The judgment of the Court of Appeals affirming the District Court without opinion was entered October 5, 1977.

A Petition for Rehearing, duly filed, was denied without opinion October 20, 1977.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, the issuance of the certified judgment in lieu of the formal mandate in the above case was stayed until November 26, 1977.

Jurisdiction of this court is invoked under Section 1254 (1) of the U. S. Code.

The District Court had jurisdiction under Section 1343 (3) (4) because this action arises under Section 1983 of the U. S. Code, Title 42.

Questions Presented for Review

1) Does a ten month summary suspension of a truck driver's driving license, issued by the Respondent February 4, 1974 without sufficient proof and no finding of due notice, and without a hearing prior to the effective date of the suspension, issued as additional penalty for a conviction for driving 52 miles in a 40 mile zone in July 1973, for which the judge fined the licensee $25.00 and could have, but did not, suspend the license, constitute double jeopardy and a denial of due process under the Fifth and Fourteenth Amendments of the United States Constitution?

2) Was the said summary suspension between February 4, 1974 and December 6, 1974, the date when Petitioner first had knowledge or notice of the suspension, vacated and made ineffective between those dates by a finding of the Respondent after a hearing on December 12, 1974 that Petitioner was subject to a suspension of only one month and an order reducing the suspension to twenty days from December 6 to December 26, 1974?

Constitutional and Statutory Provisions Invoked

A review of this case involves the due process, equal protection clauses and the double jeopardy clause of the Fourteenth and Fifth Amendments of the United States Constitution and certain statutes and rules of New Jersey, which are set forth in full in the appendix.

N.J.S.A. 39:5-30 provides that the Respondent can suspend a license for any violation of the Motor Vehicle laws "after due notice of such proposed suspension, revocation or prohibition and the grounds thereof", and that he may summon witnesses at a hearing and the hearing may be delegated to employees who shall recommend, in writing, whether or not the license shall be suspended.

The Supreme Court in *Atkinson* vs. *Parsekian,* 37 N.J. 143 179 A2d 732, held that the statute requires an administrative hearing at which testimony is taken.

That statute is limited by the Supreme Court in *David* vs. *Strelecki,* 51 N.J. 563, 242 A2d 371, which held that the Respondent can not suspend a license to punish a driver for infractions of the Motor Vehicle act, that being for the courts, but can suspend only on a determination that the highway would be a safer place for the public if the violator were removed for a certain period of time, which obviously requires a hearing.

N.J.S.A. 39:5-30.3 provides that if a licensee accumulates twelve points in a three year period the license may be suspended after a hearing.

And, a so-called Persistent Violator Rule of the Respondent which allows summary suspension without a hearing regardless of the circumstances or damage or hardship to the licensee.

Statement of the Case

On December 6, 1974, the Petitioner while driving a tractor trailer in Florida was notified by his employer, who periodically checks the license records of its drivers, and learned for the first time that his license had been suspended ten months earlier on February 4, 1974. The Petitioner immediately returned to New Jersey, stopped driving, and asked for and obtained a hearing December 12, 1974 at which time he surrendered his license.

At the hearing, the Respondent claimed that an order of summary suspension without a prior hearing, requiring Petitioner to stop driving and surrender his license within five days, was sent to Petitioner by ordinary mail February 4, 1972 because of a conviction for driving 52 miles an hour in a 40 mile zone in July 1973, for which the judge had fined him $25.00 and could have committed him to jail and suspended his license, but did not.

The only proof of notice was an unsworn statement that it had been mailed by an employee.

Petitioner, age 35, unmarried and living alone and driving through the United States and away from home for weeks at a time, has stated in an affidavit, under oath, that he never received the notice and had no notice or knowledge of it until December 6, 1974.

No Court or hearing officer has found that Petitioner had any notice prior to December 6, 1974.

Petitioner, in the ten years before this controversy had driven trucks and tractors throughout the United States 700,000 or 800,000 miles, generally at full speed, without accident.

In the three years prior to December 1971, Petitioner accumulated twelve points for minor traffic convictions. On August 1, 1972, after a hearing, his license was suspended for two months under N.J.S.A. 39:5-30.3 and was returned October 1, 1972. When a license is restored after suspension, it has all the same rights and privileges as the original issue and there is nothing in the cases of the Supreme Court or Statutes of New Jersey to the contrary, and it is not subject to suspension again for minor traffic convictions unless the licensee accumulates twelve points in a three year period.

In the 5½ years after December 1971 he has had but two minor convictions, 4 points for the speeding conviction in July 1973, and 3 points for careless driving, turning into a wrong lane in May 1974. In each case he was fined $25.00 and the court could have, but did not suspend his license.

Therefore, he could not be suspended, even after notice of hearing, under the twelve point law and there is no evidence that he was a danger on the highway.

Critical Question in this Case

However, the order restoring the license October 1, 1972, without any specific or general legislative authority, contained the following notice:

> "this restortion is made with the distinct understanding that if you are again convicted of a moving violation in New Jersey within a year of the above date of restoration: your driver's license privileges will be suspended forthwith".

This case depends on whether or not this unreasonable, arbitrary notice of the respondent is sufficient to make the mandate of due notice and meaningful hearing of *Bell* vs. *Burson,* 402 U.S. 533, ineffective in the state of New Jersey.

The Petitioner claimed at the hearing of December 12, 1974 that he had no notice before December 6, 1974 and

that the summary suspension was invalid. The hearing examiner found that the Petitioner was subject to a suspension of only one month and thereupon recommended a twenty day suspension and dated it back to December 6, 1974, the date when Petitioner first had notice.

The computer record of the Petitioner's license was not corrected to show this limitation of the suspension to twenty days.

The license was restored in good standing and Respondent admits that Petitioner did not drive during the twenty days.

The matter was, therefore, entirely closed, was res judicata, and the Respondent was estopped from further suspension for any matter that was before the examiner on December 12, 1974 and particularly a charge of driving while suspended between February 4 and December 6, 1974. The examiner knew that the Petitioner was driving continuously between those dates and the careless driving conviction, turning in a wrong lane in May of 1974, was on the transcript of the Petitioner's record before the examiner.

The Petitioner's affidavit of August 30, 1976 in support of the motion for summary judgment said that at the close of the hearing December 12, 1974:

> "I asked if that settled everything and the examiner said something to the effect that these things were on the computer and may bob up again but we will cross that bridge when we come to it."

Petitioner had forty-five days to appeal from the December 12, 1974 decision. He did not because he had had the uninterrupted use of his license from February 4 to December 6, 1974, the twenty day suspension had only two weeks to run and the cost and work involved would not justify an appeal. No constitutional issues were raised. He was advised and assured that suspension was vacated between those dates.

However, three months later, after the time for appeal had expired, the Petitioner was summoned to a hearing before a different hearing examiner on March 14, 1975 on a proposed suspension of his license for six months on the ground that he drove while suspended. The hearing was not meaningful as required by *Bell* vs. *Burson* because the examiner disregarded the decision of December 12, 1974 and was bound by the computer record that showed that the license was suspended February 9, 1974 and was restored December 26, 1974 and the careless driving conviction of May 1974 which showed that the Petitioner had been driving during that period, a fact that Petitioner had freely admitted at the December 12, 1974 hearing. The examiner reduced the suspension to three months because he "considered that he (Petitioner) may not have had notice of the February 4, 1974 suspension."

Petitioner appealed the March 14, 1975 three month order of suspension to the Appellate Division and the suspension was stayed pending litigation. The Petitioner sought to raise the constitutional objections to the February 4, 1974 summary suspension because for the first time the Respondent claimed it to be valid in spite of the December 12, 1974 decision.

The Appellate Division affirmed the March 14, 1975 suspension February 20, 1976 on state law only and denied jurisdiction to decide the constitutional questions and did not consider or decide them saying:

> "Appellant's constitutional arguments directed to the Persistent Violators Rule and February 4, 1974 notice of suspension are not cognizable on this appeal."

Further review by the Supreme Court of New Jersey was denied.

A Petition for Certiorari in the United States Supreme Court was dismissed on stipulation after applications for a stay were denied. Petitioner was advised that the petition would be denied because he could not show as required by Rule 23 (F) of the rules of this Court that the constitutional issues were "timely and properly raised so as to give this Court jurisdiction to review the judgment on a Writ of Certiorari."

The Respondent issued an order July 19, 1976 suspending Petitioner's license for three months for driving while suspended.

Petitioner surrendered his license and commenced this suit August 2, 1976 under Section 1983 on the ground that the suspensions issued by the Respondent acting under color of state law were invalid and denied Petitioner constitutional rights of due process, equal protection and freedom from double jeopardy, whereby Petitioner was injured and was entitled to equitable relief and damages at law. The license was restored after two months pending final decision of the District Court.

Petitioner's demand for judgment in the complaint was as follows:

A. That the Summary suspension order dated February 4, 1974 is invalid, null and void as a denial of due process.

B. That any and all suspensions for violating the said summary suspension by driving between February 4 and December 6, 1974 are invalid, null and void.

C. That the defendant be ordered to correct and amend the record of the Plaintiff's driver's license in the Division of Motor Vehicles to eliminate all invalid suspensions.

D. That the Plaintiff be awarded a money judgment for his damages and costs.

Both parties moved for summary judgment. The District Court found there was no issue of facts and granted summary judgment to the Respondent.

The District Court held,

A) That the constitutional questions were insubstantial, and

B) That this case was barred by res judicata by reason of the proceedings in the State Court.

The Court of Appeals affirmed without an opinion and denied a motion for rehearing.

Petitioner's license had been restored pending final judgment by Judge Biunno in the District Court. The Court of Appeals stayed the mandate until November 26, 1977 pursuant to Rule 41 (b) and it will be further stayed by the filing of this petition before that date.

The Respondent regarded Judge Biunno's decision as final by the order of judgment of the Court of Appeals October 5, 1977 and demanded and received the surrender of Petitioner's license for the remaining 28 days of the suspension. The Respondent has refused to restore it pending final disposition of this petition notwithstanding that the judgment is not yet final and Petitioner will be further damaged by a loss of four or five thousand dollars and will default on four $200.00 a week payments on his tractor.

Reasons for Granting the Writ

The Court of Appeals by affirming the decision of the District Court without opinion has decided important state questions in a way in conflict with the applicable state laws; and has decided federal questions of due process, equal protection and double jeopardy in a way in conflict with the applicable decisions of this Court and has so far sanc-

tioned a departure from the accepted and usual course of judicial proceeding by a lower court as to call for the exercise of this Court's power of supervision.

Argument Amplifying the Reasons Relied on for the Allowance of the Writ

There is no basis for res judicata. This action under Section 1983 to invalidate the summary suspensions of February 9, 1974 and July 19, 1976 and for damages and equitable relief, some of which accrued in July 1976 after the close of the state proceedings, could not have been brought in the state court and is an entirely different cause of action from the proceedings in the state court to invalidate the suspension of March 14, 1975 and is not barred by res judicata. Petitioner sought to raise the constitutional issues in the state court but the Appellate Division denied jurisdiction and held that they were not cognizable on that appeal. Since they were not raised or decided in the state court, there is no basis for collateral estoppal in this case. *Cromwell* vs. *Sac,* 94 U.S. 351; *Lawlor* vs. *National Screen Service Corp.,* 349 U.S. 322; *Sealand* vs. *Godet,* 414 U.S. 573.

The Constitutional Questions are Substantial

Under *Monroe* vs. *Pope,* 365 U.S. 163, and *McNeese* vs. *Board of Education,* 373 U.S. 686,

1) It is not necessary to exhaust state remedies in order to present an action under Section 1983.

2) It is immaterial whether the Defendant's conduct is legal or illegal under state law if it violates U.S. Constitutional rights.

3) Section 1983 was to provide a Federal remedy where state law is inadequate or though adequate in theory, was not available in practice.

The affirmance of the three months March 14, 1975 suspension by the Appellate Division, under state law may make it more binding in New Jersey, but is irrelevent in this action.

There is Insufficient Proof of Notice of the February 4, 1974 Summary Suspension

Petitioner's complaint pleaded no notice or knowledge of the February 1974 suspension before December 6, 1974. The Respondent's answer denied this.

Petitioner supported his motion for summary judgment in the District Court with a sworn affidavit that he never received the order had no notice prior to December 6, 1974. Under Rule 56(e), the Respondent cannot rely upon denials alone but must produce proof by affidavit. He offered only an unsworn statement of an employee that the order was sent by ordinary mail and a heresay statement that it was not returned, which is not sufficient.

Even the hearing examiner March 14, 1975 expressed a doubt because he reduced the suspension from six months to three because he "considered that he (Petitioner) may not have received the notice of suspension". No hearing examiner or Court has made a finding that the Petitioner has had actual notice prior to December 6, 1974. The District Court held there were no issues of fact and stated, "the only real claim is that Ring never received it".

The fact of no notice prior to December 6, 1974 was established on the Petitioner's motion for summary judgment.

Driving while suspended is a "crime" in New Jersey, punishable by fine or jail sentence. All the elements of the crime must be proved beyond a reasonable doubt, including a notice of suspension. All doubts must be resolved in favor of the Petitioner. *State vs. O'Keefe,* 135 N.J. Super. 130, 333A2d 590.

The Respondent has justified the February 4, 1974 summary suspension as a means of "expediciously removing a dangerous driver from the highway". That requires a hearing but there was no prior hearing and no evidence to support such a finding.

The District Court, however, called it what it really is:

> "the administrative rule is merely to impose a suspension by way of penalty resulting from the conviction"

which is beyond the jurisdiction of the Respondent and makes the suspension invalid as double jeopardy. *David vs. Strelecki.*

No Hearing Prior to the February 4, 1974 Suspension

Petitioner contends that the February 4 suspension was invalid under *Bell vs. Burson* because there was no hearing before it was to become effective, because a minor conviction in July 1973 was not an emergency in February 1974.

The District Court said, "Ring's reliance on *Bell vs. Burson* was misplaced" because of the "pattern of the law in New Jersey". The pattern of the law in New Jersey referred to by the District Court is not the cases of the Supreme Court and the statutes of the legislature of New Jersey, all of which require a hearing as in *Bell vs. Burson.* The pattern of the law referred to by the District Court are the rules and regulations of the Respondent under the so-called Persistent Violator Rule and the condition attached to the return of the license in October 1972 which provides for a summary suspension without a hearing for any future conviction regardless of the circumstances or the damages or hardship to the licensee.

The District Court has erroneously held that a hearing in court to determine whether or not the Petitioner was guilty of speeding in July 1973 will suffice for the hearing required by the Respondent in February 1974, to determine whether or not the Petitioner is a dangerous driver to be removed from the highway.

There was no hearing in July 1973. The Petitioner pleaded guilty to speeding, not to being a dangerous driver and that issue was never raised.

The District Court has Sustained Inconsistent Findings

The District Court's opinion stated that the hearing examiner on December 12, 1974:

> "found Ring to be subject to a one month suspension but recommended only a 20 day suspension from December 6, 1974 the day that Ring said he stopped driving. Ring surrendered his license and it was restored in good standing December 26, 1974".

That would invalidate the summary suspension between February 4, 1974 and December 6, 1974. *Armstrong vs. Manzo,* 380 U.S. 545.

However, the District Court then said:

> "the hearing examiner, on March 14, 1975 found the Persistent Violators suspension had been effective From February 9, 1974 to December 26, 1974."

Denial of Equal Protection

The Respondent's rule of summary suspension is a denial of equal protection because it does not apply to all licensees but only to those licensees who have had their licenses suspended and restored, *Bell vs. Burson,* at page 534. It does not apply to all licensees who have their

licenses suspended and restored but only to those suspended for 12 points. It does not apply to licensees suspended for driving under the influence of liquor and then restored.

Damages

Because the Petitioner drove 12 miles over the speed limit in 1973 and because his sworn affidavit that he never received the notice of suspension prior to December 6, 1974 was held insufficient to overcome the burden of proof of notice shifted to him by an unsworn statement that it was sent by ordinary mail, the Petitioner has suffered or will suffer more than twelve thousand dollars damage in 1977. This can not be justified by any rule of reason.

As an owner-driver of a tractor, he is subject to approval of the companies insuring the cargo and trailers and he has been disapproved by at least one insurance company as a long haul driver because of his record of suspensions. His insurance has increased 35% and he is limited to 250 miles from his home base. He will thus be damaged for several years unless these suspensions, if invalid, are removed from the record.

In an affidavit sworn to October 14, 1976, presented to the District Court, the Respondent said:

> "In July, 1975, after a discussion with the Deputy Attorney General then handling the case, I agreed that the case should be settled by reinstating Mr. Ring's driving privileges, because I felt that there may have been some confusion in the ruling of hearing officer Janotti in December 12, 1974 hearing. A similar offer was made in August 1976."

The Respondent offered to return the driver's license and cancel the remaining portion of the three months

suspension, but he did not offer to correct the record and remove the invalid suspension from the record.

Petitioner declined the offer.

Thereafter the respondent reasserted the three month suspension which had been stayed, ten weeks of which has been served at a loss of over ten thousand dollars to the petitioner.

The affidavit of the Respondent states he has issued many of these summary suspensions of one to three months. Many must be to licensees who have suffered damage and hardship because they need their licenses to earn a living and who cannot afford the expense of an appeal which seems futile. The decision of the Court of Appeals justifies this policy and authorizes unlimited summary suspensions regardless of constitutional rights.

Whether or not the Petitioner is entitled to damages under *Wood vs. Strickland,* 420 U. S. 308, he is entitled to equitable relief, declaring invalid and removing the suspensions from the record. *Sterling vs. Constantin,* 297 U.S. 378.

Love vs. Dixon, decided by this court May 16, 1977, is not controlling. That related to suspension without a hearing in several carefully defined and limited situations under a statute of the State of Illinois. There are no statutes of New Jersey justifying summary suspension.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Appendix A, Opinion of Judge Biunno.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

JOHN E. RING v. JOHN A. WADDINGTON Civil 76-1509

MOTION RULING

Opinion by Judge Biunno

THE COURT: Ring challenges an order entered by Waddington, Director of the Division of Auto Vehicles (N. J.) suspending Ring's privilege to drive a motor vehicle. Ring claims that the State's "persistent violator rule" (N.J. Adm. Code 13:19-19-10.7) as well as his original suspension under that Code are invalid in that they deprive him of due process.

The jurisdiction claim is under 42 U. S. Code 1983. The matter is now before the Court on cross-motions for summary judgment and there are no material issues of fact.

Ring's driver's license was suspended under the "point system" of the Division of Motor Vehicles (N.J.S. 39:5-30.3; N.J. Adm. Code 13:19-10.1 et seq.).

When the suspension ended Ring's license was restored, along with a notice that the restoration was "with the distinct understanding that if you are again convicted of a moving violation in New Jersey within one year of the above date of restoration, your driver's license privilege will be suspended forthwith." This notice embodies the consequences of the "'persistent violator rule" mentioned above. The restoration of Ring's license occurred on October 1, 1972.

Thereafter, Ring was charged with and convicted of speeding in Bergen County District Court. The conviction was during the year mentioned, on July 14, 1973.

Pursuant to the "persistent violator rule" and the condition of the restoration, Waddington mailed Ring notice of suspension. This was mailed February 4, 1974, and the notice stated that the suspension was to be effective from February 9, 1974, to a date one month after receipt by the Division of his driver's license.

Ring says he did not receive this notice and he continued to drive until December 6, 1974, when he asked for and was given a hearing which was held on December 12, 1974. The Hearing Examiner found Ring to be subject to a one-month suspension but recommended only a twenty-day suspension from December 6, 1974, the date when Ring said he had stopped driving. Ring surrendered his license and it was restored to good standing on December 26, 1974.

Meanwhile, Ring had been convicted on a charge of careless driving on May 13, 1974, in Hudson County, and based on that conviction the Division sent notice on March 4, 1975, of a proposed six-month suspension on the ground that Ring had been operating a motor vehicle during the period of suspension which had begun February 9, 1974.

This 1975 notice told Ring he had a right to ask for a hearing and he did. The hearing was held on March 14, 1975. The Examiner found that the "persistent violator" suspension had been effective from February 9, 1974, to December 26, 1974, and recommended a three-month suspension effective April 4, 1975.

Ring then appealed to the Appellate Division, Superior Court, claiming, among other things, that the rule he challenges here, as well as the February 9, 1974, suspsion, denied him due process. On February 20, 1976, the Appellate Division affirmed the suspension for driving during the period of suspension. His Constitutional challenges were held not cognizable because his challenge was out of time.

A petition for certification was denied on June 1, 1976, and motion for rehearing was denied on June 21, 1976. A petition for certiorari was filed on June 30, 1976, with the United States Supreme Court and on August 4, 1976, that petition was dismissed based on a stipulation of counsel to that effect.

This action was filed on August 2, 1976.

Ring has had hearings throughout these proceedings. His challenge to the administrative rule on "persistent violators" is that it authorizes suspension without a hearing in advance. The objection is insubstantial from the Constitutional standpoint. A driver who has had his license suspended has it restored, under the administrative rule, subject to a condition which exposes him to the risk of further suspension under the rule if he is convicted of a moving violation within a year, as Ring was.

The proceedings on the moving violation which activate the rule are on notice of hearing. Thus the effect of the administrative rule is merely to impose a suspension, by way of penalty, resulting from the conviction, if there be one, after hearing.

The claim that the administrative suspension under the rule that was mailed to him on February 4, 1974, is also insubstantial. The only real claim is that Ring never received it. However, he does not challenge the fact of mailing nor does he challenge the fact that the letter was never returned to the sender.

Under New Jersey law, it is the obligation of every driver to keep the Division informed of his residence address. Beyond that, Ring had already received notice. That notice consisted of the conditions stated in the restoration of his license on October 1, 1972, which told him that the restoration was on the distinct understanding that a moving violation conviction within one year would suspend his driver's license forthwith.

He knew he was charged with the speeding violation. He knew he was tried for it and he knew he was convicted. All of these things happened within his knowledge during the one-year period of which he was already on notice. See also in this regard Mullane v. Central Hanover Trust, 339 U.S. 306 (1950).

Rings' reliance on Bell v. Burson, 402 U.S. 535 (1971) is misplaced. As noted above, the pattern of the law in New Jersey is such that the driver facing suspension of his driver's license under the "persistent violator" rule is given a hearing, namely, the hearing on the moving violation charge, conviction on which brings about the suspension. Beyond that, the record shows that whenever requested, even though it may not have been obliged to do so, the Division granted Ring a hearing.

At the time this complaint was filed, PL 94-381 had not yet been enacted. That law repealed 28 U. S. Code Sec. 2281 and Sec. 2282. Consequently, the questions raised here would ordinarily have called for the convening of a three-judge court. However, under the law in effect for such courts, they were never convened where a threshold inquiry disclosed that the Constitutional questions raised were insubstantial. Majuri v. United States, 431 F.2d 469 (CA 3, 1970), certification denied, 400 U.S. 943. This preliminary evaluation applies to challenges of State regulations as well as to State statutes. AFL v. Watson, 327 U.S. 582 (1946).

As noted above, the Court finds that the challenges to the "persistent violator" rule, and to the suspension notice of February 4, 1974, are insubstantial in the Constitutional sense.

It is also noted that the action here is also barred by res judicata. Ring raised that identical claim in the State Courts. His argument that he is now attacking the sus-

pension of July 19, 1976, rather than the earlier one, is no more than an exercise in semantics. The substance of his claim necessarily is grounded on the challenge to the February 9, 1974, order of suspension.

The Appellate Division's ruling that Ring was out of time in challenging that suspension is an adverse adjudication which precludes his bringing the present action. Angel v. Bullington, 330 U.S. 183 (1947); American Surety v. Baldwin, 287 U.S. 156 (1932).

The principle applies to civil rights actions like this one. Mertes v. Mertes, 350 F. Supp. 472 (D. Del 1972), aff'd 411 U.S. 961 (1973). That summary affirmance is binding on this court. Hick v. Miranda, 422 U.S. 332 (1975).

For the foregoing reasons, Ring's motion for summary judgment is denied and Waddington's motion for summary judgment is granted.

Dated: November 22, 1976.

Vincent P. Biunno, U.S.D.J.

Appendix B, Opinion, Superior Court of New Jersey Appellate Division A-2180-74.

John E. Ring,

Appellant,

v.

John A. Waddington, Director

Respondent.

Submitted January 27, 1976—Decided Feb 20 1976

Per Curiam

Appellant's driving privileges were suspended for 90 days for operating a motor vehicle during a period of suspension. We have stayed suspension during the pendency of this appeal.

On February 4, 1974, the Director mailed appellant a notice of suspension under the persistent violator rule (*N.J.A.C.* 13:19-10.7). The notice stated that suspension was to be "effective February 9, 1974 and for One Month from the date your driver license is received at this office." Claiming not to have received the notice, appellant did not respond until December 1974, when he requested and received a hearing on the persistent violator suspension. The hearing officer recommended, "Deny driver's license 20 days from December 6, 1974." Appeal was not taken from this suspension.

On May 13, 1974 appellant had been convicted of careless driving and, based upon this conviction, on March 4, 1975, the director sent a notice of proposed suspension for driving during a period of suspension. This notice informed appellant of his right to a hearing and he so applied. Following this hearing the appealed-from suspension was imposed.

Appendix B, Opinion, Superior Court of New Jersey Appellate Division A-2180-74.

Appellant here contends that (1) his license was not suspended at the time he was arrested for careless driving; (2) he did not receive proper notice of the February 9, 1974 suspension; (3) the "persistent violator rule" is a denial of due process, and (4) the suspension was solely a punishment.

This appeal was perfected without a verbatim record of the proceedings in the Division. R. 2:5-3(e). Accordingly, we cannot detail the considerations upon which the hearer based his finding that app llant had driven during a period of suspension. However, in order to reach his conclusion, the hearer must have found that the persistent violator suspension was effective February 9, 1974, and did not end until 30 days after the surrender of appellant's license. In reaching this conclusion, the hearer made a finding of fact which we find is sufficiently supported by a fair reading of the February 4, 1974 suspension order. *Atkinson* v. *Parsekian,* 37 *N.J.* 143, 149 (1962).

Appellant's constitutional arguments directed to the persistent violator rule and February 4, 1974 notice of suspension are not cognizable on this appeal. The time for appeal from the earlier suspension has long since run. *R.*2:4-1. Finally, we find no support in the record for appellant's argument that the suspension was a punishment contrary to the directive of *David* v. *Strelecki,* 51 J. J. 521 (1968).

Appellant's suspension is affirmed.

Appendix C, Hearing Office Report.

Hearing Officer, Ernest J. Jannotti, Jr., report: December 12, 1974

LICENSEE'S STATEMENT: Did not receive notice of suspension. Have always complied in the past. First found out about suspension about a week ago while in Florida based on abstract information. Has definite need for driver's license for a living. Past record shows always complied with prior suspensions. Without driver's license can't earn a living. Father just recently bought a truck that Respondent is supposed to operate. Has tried to change driving habits. If had received notice would have complied. Stopped driving Friday, December 6, 1974 as soon as he found out about suspension. Drives a lot of miles, much more than average person. Not denying violation which caused suspension. Mail service not always reliable.

EXAMINER'S CONCLUSION: Notice of suspension sent to correct address, no return by Post Office. Claims notice of suspension was not received. Claims needs driver's license for a living. Claims not driven since December 6, 1974. Under Administrative practice is has been established that the licensee has been convicted for a subsequent moving violation (persistent violator) and adequate notice was sent to address of record that his license had been restored with distinct understanding if a subsequent moving violation was incurred suspension of his license would ensue. It should be noted that the aforementioned issues were not being contested at this hearing. Request has been made that consideration be given to the Respondent's urgent need for a driver's license and that he has always complied with suspensions in the past.

RECOMMENDATION: Deny driver's license 20 days from December 6, 1974. Surrender date of license December 12, 1974.

Appendix D, Hearing Office Report.

Hearing Officer, Gregory Smith—report: March 14, 1975

LICENSEE'S STATEMENT: States he didn't receive notice of suspension for the February 9, 1974 suspension. States that any other time he received notice of suspension he mailed in driver's license. Needs driver's license to earn a living as a truck driver. States that he learned about the suspension on December 6, 1974 when his employer got a copy of his driving record. Stated that he immediately stopped driving. States that he owns his own truck and a suspension would cause him to lose it. States that he may have been out of State at the time of notice.

CONCLUSION: Considered need and exposure to the road. Considered that he may not have received the suspension notice. However, there is no proof of this. The notice was mailed to the correct address and nothing was returned undelivered.

RECOMMENDATION: Suspend 3 months effective April 4, 1975.

Hearing Officer, Gregory Smith—report: March 14, 1975

Appendix E, N.J.S.A. 39:5-30; N.J.S.A. 39:5-30.3.

N.J.S.A.
39:5-30 Suspension or revocation of registration certificates and drivers' licenses or reciprocity privilege; written notice; summoning witnesses; failure to obey summons; penalties; witness fees; hearings under delegated authority

Every registration certificate and every license certificate to drive motor vehicles may be suspended or revoked, and any person may be prohibited from obtaining a driver's license or a registration certificate, and the reciprocity privilege of any nonresident may be suspended or revoked by the commissioner for a violation of any of the provisions of this Title or on any other reasonable grounds, after due notice in writing of such proposed suspension, revocation or prohibition and the ground thereof.

He may also summon witnesses to appear before him at his office or at any other place he designates, to give testimony in a hearing which he holds looking toward a revocation of a license or registration certificate issued by or under his authority. The summons shall be served at least five days before the return date, either by registered mail or personal service. A person who fails to obey the summons shall be subject to a penalty not exceeding one hundred dollars ($100.00), to be recovered with costs in an action at law, prosecuted by the Attorney-General, and in addition the vehicle registration or driver's license, or both, as the case may be, shall forthwith be revoked. The fee for witnesses required to attend before the commissioner shall be one dollar ($1.00) for each day's attendance and three cents ($0.03) for every mile of travel by the nearest generally traveled route in going to and from the place where the attendance of the witness is required. These fees shall be paid when the

witness is excused from further attendance, and the disbursements made from payment of the fees shall be audited and paid in the manner provided for expenses of the department. The actual conduct of said hearing may be delegated by the commissioner to such departmental employees as he may designate in which case the said employees shall recommend to the commissioner in writing whether the said licenses or certificates shall or shall not be suspended or revoked. As amended L.1939, C. 216, p. 614 2; L.1945, c.256, p. 782, 1.

N.J.S.A.
39.5-30.3 Points accumulation over three year period; hearing

An accumulation of 12 points within a 3 year period may cause a driver to be subject to a hearing before the Director of the Division of Motor Vehicles or a hearing officer designated by the director on a rule to show cause why his driver's license should not be suspended, or the driver may elect to attend a Division of Motor Vehicles Driver Improvement School. The director, in his discretion, may permit a driver subject to suspension under this section to elect to attend a Division of Motor Vehicles Driver Improvement School in lieu of all or part of a period of suspension.

L.1969, c. 261 2, eff. Jan. 8, 1970

Va.—Acts 1968, c. 166

Appendix F, Persistent Violator Rule.

Restoration after suspension or official warning or warning after successfully completing a Division Driver Improvement School Course following accumulation of twelve or more points shall be with the express condition and understanding that conviction of any violation of the motor vehicles laws of New Jersey within a period of one year thereof may result in summary suspension of driving privileges, without hearing, for the following periods:

(a) When the violation occurred within six months of the date of action ..... three months;

(b) When the violation occurred after six months but within nine months of the date of action ..... two months;

(c) When the violation occurred after nine months but within one year of the date of action ..... one month.

N.J.A.C. 13:19-10.7

Appendix G, Judgment Order.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1113

RING, John E.,
Appellant

vs.

WADDINGTON, John A., Director of the Division of Motor Vehicles of the State of New Jersey
(D.C. Civil No. 76-1509)

Argued October 4, 1977

Before SEITZ, *Chief Judge*, BIGGS and HUNTER,
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,
SEITZ
Chief Judge

Attest:

THOMAS F. QUINN
Thomas F. Quinn, Clerk

Dated: October 5, 1977

Order Denying Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1113

RING, John E.,
Appellant

v.

WADDINGTON, John A., Director of the Division of Motor Vehicles of the State of New Jersey
(D.C. Civil No. 76-1509)

ORDER

Present: SEITZ, *Chief Judge*, BIGGS and HUNTER, *Circuit Judges.*

ORDERED that the petition for panel rehearing is denied; and it is

FURTHER ORDERED that the motion for a stay pending disposition of the petition for panel rehearing is denied as moot.

By the Court,

(Illegible) SEITZ
Chief Judge

DATED: October 20, 1977

Order Staying Mandate.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1113

RING, John E.,

Appellant

vs.

WADDINGTON, John A., Director of the Division of Motor Vehicles of the State of New Jersey

Present: SEITZ, *Chief Judge* and BIGGS and HUNTER, *Circuit Judges*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until November 26, 1977.

SEITZ
Chief *Judge*

Dated: October 31, 1977